EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UTEX COMMUNICATIONS CORP.,

PLAINTIFF,

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS, JULIE CARUTHERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, AND SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A AT&T TEXAS, F/K/A/ SBC TEXAS,

DEFENDANTS.

CIVIL ACTION

NO. A-06-CA-567-LY

AT&T TEXAS' MOTION TO DISMISS

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TO THE HONORABLE LEE YEAKEL, UNITED STATES DISTRICT JUDGE:

Pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6): Southwestern Bell Telephone, L.P., d/b/a AT&T Texas (f/k/a SBC Texas), respectfully moves to dismiss the First Amended Complaint ("Complaint") of UTex Communications Corp. ("UTex").

INTRODUCTION

The Complaint is complex: In its 40 pages, it purports to allege 16 claims arising out of three separate proceedings in the Public Utility Commission of Texas ("Commission") relating to technical, substantive, and procedural issues under the federal Telecommunications Act of 1996 ("1996 Act" or "Act"). In this Introduction, we provide the background the Court will need to decide AT&T Texas' motion to dismiss, including the pertinent requirements of the 1996 Act and a description of the Commission proceedings that gave rise to the Complaint. Once that background is in hand, the motion to dismiss is rather simple and straightforward: As we will demonstrate, the Complaint, among other failings, asserts claims over which the 1996 Act gives the Commission original exclusive jurisdiction; asserts claims that are indisputably moot in light of subsequent developments; and asks this Court to remedy alleged Commission shortfalls over which the 1996 Act unequivocally gives the Federal Communications Commission ("FCC") exclusive jurisdiction. None of the 16 counts in the Complaint states a claim on which relief can be granted by this Court.

I. The Telecommunications Act of 1996

Ten years ago, Congress dramatically changed the nature of telecommunications regulation by passing the Telecommunications Act of 1996. The 1996 Act was the culmination of efforts over several years by legislators and telephone companies to open up, on a nationwide basis, the market for all types of telephone service, including local exchange service, to full, fair, and effective competition.

A principal aim of the 1996 Act was to transform local telecommunications from a market characterized by exclusive franchises to one in which competition flourishes. S. Conf. Rep. No. 104-230, at 148 (1996). To that end, the 1996 Act requires "incumbent" local exchange carriers ("incumbent LECs"), such as AT&T Texas (f/k/a SBC Texas f/k/a Southwestern Bell), to enter into "interconnection agreements" with competing local exchange carriers, such as UTex. These agreements establish terms and conditions on which incumbent LECs provide their competitors with interconnection with the incumbent's network (so traffic can flow between the carriers' networks); use of individual elements of the incumbent's network on an "unbundled" basis (so competitors can serve their customers without having to build their own networks from scratch); and various telecommunications services. Section 251 of the 1996 Act establishes the standards under which incumbent LECs will provide interconnection, unbundling of network elements, and telecommunications services. 47 U.S.C. §§ 251(b) and (c). The FCC establishes the rules to implement Section 251. *Id.* § 251(d).

Section 252, in turn, establishes the procedural framework by which competing carriers may forge interconnection agreements ("ICAs") with incumbent LECs. Section 252(a) requires incumbent LECs to negotiate these agreements with requesting carriers upon request. 47 U.S.C. § 252(a). If negotiations do not yield a complete agreement, the Act provides for arbitration of open issues by the state utility commission, 47 U.S.C. § 252(b), or, if the state commission declines to perform that role, the FCC, 47 U.S.C. § 252(e)(5). As arbitrator, the state commission (or the FCC) resolves the open issues, ensuring that "such resolution and conditions meet the requirements of section 251" and the FCC's rules implementing Section 251, and that rates for interconnection, services, and network elements are set in accordance with the pricing

standards set forth in the Act. *Id.* §§ 252(c)(1) and (2). The negotiation and arbitration process is to be completed in nine months. *Id.* § 252(b)(4)(C).

After an ICA is established by negotiation and/or arbitration, the parties submit it to the state utility commission for approval or rejection under the standards set forth in the Act. *Id.* §§ 252(e)(1) and (2). After the state commission approves or rejects the agreement, Section 252(e)(6) gives the federal district courts exclusive jurisdiction to review the state commission's determinations.

Once an ICA is in place, Section 252 gives the state commission original, exclusive jurisdiction to interpret and enforce the agreements in any "post-interconnection agreement disputes" ("post-ICA disputes"),[1] with its decisions again being subject to federal court review. *Southwestern Bell Tel. Co. v. Public Utils. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).

II. The Proceedings In The Texas Commission

AT&T Texas entered into an ICA with UTex in 2000 (the "2000 ICA"). UTex's claims in this case arise out of, and are for the most part challenges to decisions the Texas Commission made in, three subsequent proceedings the Commission conducted pursuant to Section 252 of the 1996 Act. Two of those proceedings were post-ICA disputes concerning the 2000 ICA, and the other was the arbitration of a new agreement to replace the 2000 ICA.

1. Docket 26381 – Arbitration Of New Interconnection Agreement

When UTex and AT&T Texas could not negotiate a complete successor agreement to the 2000 ICA, UTex filed a petition for arbitration under Section 252 of the Act, thus initiating Commission Docket No. 26381. During the arbitration process, UTex admitted that all of the

[1] "Post-interconnection agreement dispute" is the Commission's term for disputes arising over the interpretation and enforcement of an interconnection agreement after it has been approved under Section 252 of the 1996 Act. Tex. Adm. Code, Tit. 16, Part II, § 21.121.

issues it seeks to arbitrate implicate the proper regulatory classification of Voice over Internet Protocol ("VoIP") traffic.[2] In layman's terms, VoIP refers to voice service provided over a broadband internet connection using Internet Protocol technology. The recent advent and rapid growth of VoIP have created complex regulatory classification issues of great significance for the entire industry. *See, e.g., In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004) *appeal pending* (8th Cir.). The FCC has stressed the importance of national uniformity on these issues (*id.*, ¶ 1) and is addressing them in ongoing, industry-wide federal rulemaking proceedings. *In the Matter of IP-Enabled Services*, 19 FCC Rcd. 4863 (2004).[3]

Recognizing that the "regulatory classification of [VoIP traffic is] a matter . . . that has industry-wide implications," the Commission decided that it was "not appropriate" to address the issue "in the context of this arbitration." Order Abating Proceeding in Docket No. 26381, at 1 ("Abatement Order") (Att. A) (all referenced attached are included in AT&T Texas' separate Appendix). Accordingly, the Commission abated the arbitration proceeding, "pending further direction from our friends in D.C. [the FCC]." June 7, 2006 Open Meeting Transcript at 14, lines 16-19 (Att. B). This was consistent with the Commission's prior deferral of VoIP

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2 *See* UTex's Corrected Motion for Reconsideration of the Commissioners' Abatement Order in Docket No. 26381, at 6 (July 13, 2006), *available at* www.puc.state.tx.us ("[T]he Commissioners are correct that VoIP permeates the entire proceeding."). This brief references various documents that are available on the Commission's website. The Court can take judicial notice of these publicly available pleadings and orders. AT&T Texas will provide hard or electronic copies of these documents on request. To access the documents online, go to www.puc.state.tx.us, click on "Filings/Interchange," then on "Filings Retrieval," then on "Login," then type the docket number (*e.g.*, 26381) in the box labeled "Control Number." This will yield the docket sheet for the case, where individual documents can be retrieved by clicking on their document numbers.

3 *See also* FCC Public Notice, "Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls," WC Docket No. 05-83 (FCC. Oct. 12, 2005) (initiating case that will include analysis of issues regarding access charges on purported VoIP traffic), available at www.fcc.gov.

classification issues in another arbitration (Docket 28821), where it also noted that "a delay in the FCC's consideration of VoIP may warrant consideration of an interim solution. If so, the Commission may sever the VoIP issue for further consideration." Order Addressing Threshold Issues and Motion to Dismiss in Docket No. 28821, at 7 (Apr. 19, 2004), *available at* www.puc.state.tx.us.

2. Docket No. 32041 – Post-ICA Dispute: Liquidated Damages, VoIP, Tort, And Antitrust

In March 2005, UTex sued AT&T Texas in state court, seeking liquidated damages for AT&T Texas' alleged failure to meet certain requirements under the 2000 ICA. AT&T Texas removed the case to federal court and moved to dismiss, arguing that UTex had failed to exhaust its administrative remedies by first bringing its post-ICA disputes to the Texas Commission. Judge Sparks agreed, finding that the Commission had "original, exclusive jurisdiction" over such post-ICA interpretation disputes, and therefore dismissed the case. *UTex Comms. Corp. v. Southwestern Bell Tel., L.P.*, Case No. A-05-CA-262-SS, at 4-7 (W.D. Tex., June 6, 2005) (Att. C).

UTex then filed a complaint at the Commission, initiating Docket No. 32041. UTex reiterated its liquidated damages claim and added several new claims. These new counts alleged that AT&T had (i) violated the 2000 ICA by billing UTex for "access charges" on VoIP traffic,[4] (ii) tortiously interfered with UTex's existing and prospective contracts, and (iii) violated state and federal antitrust laws. The Commission dismissed the tort and antitrust claims as beyond its jurisdiction and required UTex to file a more specific complaint on its other claims. Order No. 3

[4] "Access charges" are fees that one carrier pays to a local carrier for "access" to the local carrier's network to complete calls for the first carrier. There is an ongoing national debate over whether these charges apply to VoIP traffic. *See FCC VoIP Rulemaking*, 19 FCC Rcd. 4863, at ¶¶ 32, 61.

in Docket No. 32041 (Dec. 19, 2005), *available at* www.puc.state.tx.us. UTex filed its amended complaint on February 8, 2006, and AT&T Texas again moved to dismiss. On September 1, 2006, the Commission denied AT&T Texas' motion to dismiss and directed the parties to brief a list of questions on the open issues regarding access charges on VoIP traffic and liquidated damages under the 2000 ICA. Order No. 4 in Docket No. 32041 (Sept. 1, 2006) (Att. D). Briefing will be complete on November 6, 2006. *Id.*

3. Docket No. 30459 – Post-ICA Dispute: Unbundling Requests Under Section 271 Of The 1996 Act And State Law

AT&T Texas initiated Docket No. 30459 in order to amend its ICAs, including its 2000 ICA with UTex, to implement new unbundling rules issued by the FCC under Section 251 of the 1996 Act. UTex contended that AT&T Texas should also be required to amend the 2000 ICA to reflect terms and conditions for unbundling of network elements pursuant to state law and Section 271 of the 1996 Act (47 U.S.C. § 271). The Commission found that these issues were beyond the scope of the proceeding, which was confined to implementing the FCC's new Section 251 unbundling rules. The Commission also relied on its recent decisions that it could not order state law unbundling in light of the 1996 Act's unbundling provisions and that it lacked any authority to enforce or implement Section 271. Order No. 19 in Docket No. 30459, at 5-8 (Att. E).

III. Summary Of Claims And Grounds For Dismissal

In summary form, the claims in the Complaint, and the reasons they must be dismissed, are as follows:

1. Counts 1-3 involve Commission Docket 26381, the arbitration between UTex and AT&T Texas to develop terms of a new ICA to replace the 2000 ICA. As explained above, the Commission abated Docket 26381 to await the FCC's promulgation of national rules or other

The attempt fails because, as the United States Supreme Court has held, a mere alleged violation of an ICA or a duty under the 1996 Act cannot support an antitrust claim.

ARGUMENT

On a motion to dismiss under Rule 12(b), the Court must take all well-pleaded factual allegations as true and draw reasonable inferences in favor of the plaintiff. However, the Court does not have to accept the plaintiff's conclusory allegations or legal characterizations. *E.g., Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). The Court may take judicial notice of publicly available documents, including those filed with administrative agencies, as well as orders by those agencies. *R2 Investments LDC v. Phillips*, 401 F.3d 638, 639 n.2 (5th Cir. 2005). Dismissal is required if UTex cannot prove any set of facts in support of its claim that would entitle it to relief. *E.g., Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006).

I. Counts 1-3 Fail To State A Claim Because A State Commission's Alleged Failure To Arbitrate An Interconnection Agreement Does Not Give Rise To Any Cause Of Action.

In Counts 1-3, UTex complains of the Commission's allegedly improper abatement of a proceeding to arbitrate an ICA. UTex's purported grievance is not cognizable in this Court, because the Telecommunications Act of 1996 is clear that the Commission has no duty to arbitrate ICAs and that UTex's sole recourse if the Commission fails to arbitrate an ICA is to have the FCC do so instead.

Commission Docket 26831 is an arbitration under Section 252 of the 1996 Act of terms and conditions of a new ICA between AT&T Texas and UTex. On June 22, 2006, the Commission issued an order to abate Docket 26381 pending an FCC decision establishing national rules on industry-wide issues surrounding VoIP traffic – issues that affected every aspect of the arbitration. *See* Atts. A and B. In Counts 1-3, UTex contends that the abatement

was *ultra vires*, arbitrary and capricious and otherwise unlawful. UTex asks the Court to order the Commission to "reinstitute processing of Docket No. 26381." Cmplt. Prayer for Relief 4.[5] The Commission's decision to defer VoIP issues of national concern to the body charged with making national rules and policy under the 1996 Act was sound. More important for present purposes, no relief from the Commission's decision is available in this Court.

A. The Commission Has No Duty To Arbitrate Interconnection Agreements.

The law is clear that the 1996 Act merely *authorizes* state commissions to arbitrate ICAs; it does not *require* them to do so. As the Fifth Circuit has explained, "[t]he [1996] Act permissibly offers state regulatory agencies a limited mission, which they may accept or decline." *AT&T Comms. v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 646 (5th Cir. 2001).[6] Because the 1996 Act does not require the Commission to arbitrate at all, UTex's allegations that the Commission has failed to fulfill that requirement fails to state a claim on which relief can be granted.[7]

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[5] Alternatively, UTex seeks to compel commercial arbitration of the issues that are the subject of Docket 26381. That is the subject of Count 4, which we address separately below.

[6] *Accord, MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343 (7th Cir. 2000) (Section 252 is an "invitation from Congress to the states to participate in the federal regulation of interconnection agreements" and when states accept that invitation, they are "voluntarily regulating on behalf of Congress"); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218, 224 (D. Del. 2000) ("[E]ither party may petition the relevant state public service commission to mediate any 'open issues.' A state commission, however, may decline this invitation, in which case the FCC must conduct the arbitration."); *US West Comms., Inc, v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221, 1226 (D. Ore. 1998) ("The [1996] Act also allows states to decline to carry out the regulatory roles set out above" under Section 252).

[7] An additional, independent reason to dismiss Counts 1-3 is that federal courts have jurisdiction only to review "determinations" made by state commissions under Section 252 of the Act. 47 U.S.C. § 252(e)(6). In the context of arbitrating a new ICA, this means that the Commission must have finally approved the ICA before the federal court can review its determinations. *E.g., GTE North, Inc. v. Strand*, 209 F.3d 909, 915 (6th Cir. 2000); *AT&T v. Southwestern Bell Tel. Co.*, 38 F. Supp. 2d 902 (CD. Kan 1999).

B. Under The 1996 Act, The FCC Is The Exclusive Recourse For A Party Whose Interconnection Agreement A State Commission Declines To Arbitrate.

The 1996 Act not only makes clear that state commissions are not required to arbitrate ICAs, but also dictates what happens if a state commission does not honor a petition for arbitration: Section 252(e)(5) of the 1996 Act provides that if a state commission "fails to act to carry out its responsibility under" Section 252, the FCC "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." Section 252(e)(6), in turn, expressly provides that the FCC's assumption of responsibility (with federal court review of the FCC's decisions in the arbitration) "shall be the exclusive remedies for a State commission's failure to act." Because recourse to the FCC is the exclusive remedy for a state commission's alleged failure to act, a "state commission's decision not to act is not subject to review" in court. *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 511 (3d Cir. 2001) (emphasis added, footnote omitted). UTex therefore has not stated a claim on which relief can be granted.

II. Count 4 Fails To Allege A Right To Commercial Arbitration That Is Enforceable In This Court.

Like Counts 1-3, Count 4 concerns the Commission's Abatement Order in Docket 26381. Count 4 seeks to enforce a provision in the 2000 ICA – the agreement to be succeeded by the one being arbitrated in Docket 26381 – that, according to UTex, gives UTex a contractual right to private commercial arbitration of issues over which the Commission declines jurisdiction. Count 4 purports to state a claim under the Federal Arbitration Act, but fails to allege a claim over which this Court has jurisdiction. And to the extent Count 4 is read as a claim to enforce the commercial arbitration provision in the 2000 ICA, that is a claim over which only the Commission – and, again, not this Court – has jurisdiction.

A. Count 4 Fails to State a Claim Under the Federal Arbitration Act Over Which This Court Has Jurisdiction.

Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter *of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement. (Emphasis added.)

This Court would have jurisdiction over Count 4, then, if and only if, in the absence of the alleged agreement to submit to commercial arbitration, the Court would have jurisdiction under Title 28[8] over a suit arising out of the controversy over which UTex now seeks commercial arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26 n.32 (1983); *Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001). What is that controversy? It is the arbitration issues (centered on VoIP traffic) that the Commission was arbitrating in Docket 26381 and that, according to the Complaint, the Commission wrongfully failed to resolve. In other words:

- UTex petitioned the Commission under Section 252 to arbitrate terms and conditions of a new ICA;
- the Commission proceeded with the Section 252 arbitration;
- the Commission thereafter abated the Section 252 arbitration so that the FCC could rule on the nationwide VoIP issues it presented;
- UTex characterizes the abatement as a declination of jurisdiction;
- UTex alleges that the current UTex/AT&T Texas 2000 ICA includes a provision that entitles UTex to private commercial arbitration of

[8] Title 28 (28 U.S.C.) contains the provisions that define the federal courts' jurisdiction in civil cases.

> Section 252 arbitration issues over which the Commission declines jurisdiction;
>
> - accordingly, UTex now purports to bring a claim under the FAA to compel commercial arbitration of those issues; *but*
> - this Court has jurisdiction over UTex's FAA claim if and only if it would have jurisdiction under Title 28 over a lawsuit to decide the terms and conditions of the parties' new ICA.

Would this Court have jurisdiction over a lawsuit to decide the terms and conditions of the parties' new ICA – the controversy over which UTex seeks commercial arbitration? Plainly and unequivocally not. When carriers reach an impasse in their negotiation of an ICA under Section 252 of the 1996 Act, 47 U.S.C. § 252(b)(1) confers jurisdiction solely and exclusively on the "State commission to arbitrate any open issues" (or the FCC if the state commission declines). There is no such thing, under Title 28 or otherwise, as a federal court lawsuit to arbitrate terms and conditions of an ICA. Accordingly, this Court would not have jurisdiction under Title 28 over the underlying controversy, and it is therefore without jurisdiction under Section 4 of the FAA to entertain UTex's request to compel arbitration. *See AT&T Comms. of California, Inc. v. Pacific Bell*, 60 F. Supp. 2d 997 (N.D. Cal. 1999) (dismissing request to compel commercial arbitration of a dispute over an ICA because the court would not have had subject matter jurisdiction over the underlying dispute).

B. To The Extent Count 4 Is Read As A Claim To Enforce The Parties' Interconnection Agreement, The Commission Has Exclusive Jurisdiction Over That Claim.

UTex bases its claim in Count 4 on Section 4.2 of the 2000 ICA, which provides:

> The same terms, conditions, and prices will continue in effect, on a month-to-month basis as were in effect at the end of the latest term, or renewal, so long as negotiations are continuing without impasse and then until resolution pursuant to this Section. The Parties agree to resolve any impasse by submission of the disputed matters to the Texas PUC for arbitration. Should the PUC decline

> jurisdiction, the Parties will resort to a commercial provider of arbitration services.

By its terms, Section 4.2 contemplates commercial arbitration only when the Commission has "decline[d] jurisdiction." UTex does not allege that the Commission has expressly declined jurisdiction over the issues in Docket 26381, nor could it: The Commission has exercised jurisdiction in Docket 26381; the Abatement Order is an exercise of and retention of that jurisdiction; and the Abatement Order does not even mention jurisdiction. UTex alleges, however, that the abatement is "the functional equivalent of, and constitutes, a declination to exercise jurisdiction." Cmplt. ¶ 44.

Thus, Count 4 seeks to enforce a provision of the parties' 2000 ICA, and turns in significant part on interpretation of what that agreement means by "decline jurisdiction." But any claim for interpretation and/or enforcement of an ICA is within the exclusive jurisdiction of the Commission. As Judge Sparks recognized in the UTex case discussed earlier, "the [Commission] has original, exclusive jurisdiction to hear any dispute requiring the interpretation of an interconnection agreement." Att. C at 4. This law is well settled. *E.g.*, *Southwestern Bell*, 208 F.3d at 479; *Z-Tel Comms., Inc. v. SBC Comms., Inc.*, 331 F. Supp. 2d 513, 550 (E.D. Tex. 2004); *Express Telephone Servs., Inc. v. Southwestern Bell Tel. Co., L.P.*, 2002 WL 32360295, at *4-5 (N.D. Tex. 2002); *Starpower Comms.*, 15 FCC Rcd. 11277, at ¶¶ 5-6 (2000).

Congress' confinement of actions to interpret and enforce ICAs to state commissions in the first instance makes eminently good sense, because ICAs are products of state commissions: They are, in all instances, reviewed and approved by the state commission under Section 252(e)(1) and (2)of the 1996 Act before they go into effect and, in some instances, they are the result of state commission arbitrations. Having reviewed and approved Section 4.2 of the parties' 2000 ICA, the Commission is well positioned to interpret it. And it is even more

appropriate for the Commission, rather than the Court, to interpret this particular provision, because the question is whether the Commission "decline[d] jurisdiction" over the parties' Section 252 arbitration within the meaning of Section 4.2. No forum is as well suited as the Commission to decide whether its own Abatement Order constituted a declination of jurisdiction under the contract provision it approved – though subject, of course, to federal court review under Section 252(e)(6). Indeed, if given the opportunity to address the issue, the Commission could very well decide that its Abatement Order did not constitute a declination of jurisdiction within the meaning of Section 4.2 of the 2000 ICA.

All that matters for present purposes, however, is that UTex has failed to present its ICA enforcement claim to the Commission, the body with original, exclusive jurisdiction, and therefore has failed to exhaust its administrative remedies. Count 4 therefore cannot proceed as a claim for enforcement of that agreement. *Premiere Network Servs., Inc. v. SBC Comms., Inc.*, 440 F.3d 683, 686 & n.5 (5th Cir. 2006) (1996 Act "contemplates exhaustion of administrative remedies for disputes over interconnection agreements before a state public utilities commission" before suing in federal court).

III. Counts 5-7 Fail To State A Claim And Are Also Moot Because They Seek To Compel The Commission To Do What It Is Already Doing.

Counts 5-7 involve Commission Docket No. 32041, which is a post-ICA dispute proceeding that UTex initiated. UTex claims the Commission has "abate[d]" and "refus[ed] to process" Docket 32041, and requests an order compelling the Commission to "reinstitute processing" of the case. Cmplt. ¶¶ 69, 72 and Prayer for Relief 4. Counts 5-7 fail for the same reasons as Counts 1-3, namely that (i) the Commission has no obligation to arbitrate and the Court cannot order it to arbitrate under Section 252, and (ii) the FCC has exclusive jurisdiction to conduct Section 252 arbitrations if a state commission fails to act.

CONCLUSION

For the reasons stated above, UTex's Complaint should be dismissed.

Respectfully submitted,

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ATTORNEYS FOR AT&T TEXAS

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UTEX COMMUNICATIONS CORP., PLAINTIFF,	§	
	§	
V.	§	CAUSE NO. A-06-CA-567-LY
	§	
THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS, JULIE CARUTHERS PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, AND SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A AT&T TEXAS F/K/A SBC TEXAS, DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are AT&T Texas' Motion to Dismiss filed September 29, 2006 (Doc. #37); the Public Utility Commission of Texas and Commissioners' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and (6) filed September 29, 2006, (Doc. #38); UTex Communications Corporation's Omnibus Response to the Motion to Dismiss filed by AT&T Texas, Public Utility Commission of Texas, and Commissioners filed November 1, 2006 (Doc. #42); AT&T's Reply Brief in Support of Motion to Dismiss filed November 21, 2006 (Doc. #43); Reply in Support of Public Utility Commission of Texas and Commissioners' Motion to Dismiss filed November 21, 2006 (Doc. #44); UTex Communications Corporation's Omnibus Sur-Reply filed December 1, 2006 (Doc. #45); and

Amicus Curiae Brief of TEXALTEL in Support of UTex Communications Corp. filed December 1, 2006 (Doc. #46). A hearing was held before the Court on the motions on February 1, 2007. Following the hearing, AT&T Texas submitted a letter brief dated April 6, 2007. UTex Communications Corporation subsequently filed a letter brief dated May 2, 2007. Having considered the motions, responses, replies, arguments of counsel, post-hearing letter briefs, the relevant case law, and the record in this cause, the Court renders the following opinion and order.

BACKGROUND

1. Regulatory Background

Congress passed the Federal Telecommunications Act of 1996 ("FTA"), 47 U.S.C. §§ 151-615b (2001 & Supp. 2006), to open local telecommunications markets to competition. The FTA requires incumbent local exchange carriers ("ILECs"), such as AT&T Texas ("AT&T"), to allow their new competitors, called competitive local exchange carriers ("CLECs"), such as UTex Communications Corporation ("UTex"), to resell "at wholesale rates any telecommunications service that the [ILEC] provides at retail." 47 U.S.C. § 251(c)(4) (2001). By reselling an ILEC's retail services, a CLEC can offer telecommunications services to customers without building its own telephone network.

ILECs and would-be CLECs are required to negotiate in good faith an "interconnection agreement," setting forth the terms under which they will operate. *Id.* at § 251(c)(1). The parties may decide to incorporate the requirements of federal law in their agreement, but also are permitted to "negotiate and enter into a[n] . . . agreement . . . without regard to the standards" established in the FTA. *Id.* at § 252(a)(1). If the parties cannot agree, either party may petition the state commission to arbitrate any open issues in accordance with the requirements of federal law. *See id.*

at §§ 252(b) and (c). If the state commission declines to perform that role, the parties may seek resolution by the Federal Communications Commission ("FCC"). *See id.* at § 252(e)(5).

The final version of negotiated or arbitrated interconnection agreement must be submitted to the state commission for its review and approval. *See id.* at §§ 252(e)(1) and (4). A party aggrieved by a state-commission decision approving or rejecting an agreement may seek review of that determination in federal court. *See id.* at § 252(e)(6). Once the interconnection agreement is approved, the state commission retains the authority under section 252 of the FTA to interpret and enforce an agreement if a dispute arises between the parties to that agreement. *See, e.g., Southwestern Bell Tel. Co. v. Public Utils. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).

2. Factual Background and Claims

AT&T[1] and UTex negotiated an interconnection agreement ("ICA") that was approved by the Public Utility Commission of Texas ("PUC") in 2000 (the "2000 ICA"). UTex's claims in this cause arise out of three proceedings initiated pursuant to section 252 of the FTA concerning the 2000 ICA and its successor agreement. Two of the proceedings (Docket Nos. 32041 and 30459) are post-approval disputes concerning the 2000 ICA. The third proceeding (Docket No. 26381) is the arbitration of a new agreement to replace the 2000 ICA. The Court will provide a brief synopsis of the issues involved in each of these three proceedings and will identify the counts in the instant cause that are connected with each proceeding.

[1]AT&T Texas was formally known as SBC Texas. Thus, the Court's references to AT&T identify both AT&T and SBC Texas.

a. Docket No. 26381

In 2002, UTex filed a petition with the PUC pursuant section 252(b) of the FTA to arbitrate certain terms of a new ICA between AT&T and UTex. After several scheduling extensions prolonging the proceeding beyond the nine-month limitation imposed by the FTA, *see* 47 U.S.C. § 252(b)(4), the arbitrators requested that the parties identify the disputed issues that implicated or involved Voice over Internet Protocol ("VoIP"), a relatively new technology for providing voice service over a broadband connection using Internet Protocol. The recent advent and rapid growth of VoIP has created complex regulatory classifications that are in the process of being addressed in ongoing, industry-wide federal rulemaking proceedings before the FCC. *See In the Matter of IP-Enabled Services*, 19 FCC Rcd. 4863 (2004); *see also* FCC Public Notice, "Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls," WC Docket No. 05-83 (FCC Oct. 12, 2005). In light of the pendency of the proceedings before the FCC addressing the same VoIP issues raised by the parties in the arbitration, the arbitrators dismissed UTex's arbitration petition by order dated April 27, 2006. *Petition of UTex Communications Corporation for Arbitration*, Docket No. 26381, Order No. 22 Dismissing Proceeding (Apr. 27, 2006). On appeal, the PUC vacated the arbitrators' dismissal order pending the FCC's determinations on the VoIP issues. *Id.*, Order Abating Proceeding (Jun. 22, 2006). Counts One through Four of UTex's First Amended Complaint involve the proceedings in Docket No. 26381.

b. Docket No. 32041

Docket No. 32041 was commenced after a dispute arose between the parties concerning the amount AT&T was billing under the 2000 ICA and whether UTex could bill and collect amounts

it contended were owed under certain liquidated-damages provisions in the agreement. In March 2005, UTex filed suit in state court against AT&T alleging breach of contract. The case was removed to federal court. *UTex Communications Corp. v. Southwestern Bell Telephone, L.P.*, Cause No. A-05-CA-262-SS (W.D. Tex. 2005) (*UTex I*). The Court dismissed UTex's claims for failure to exhaust, noting that the PUC must be allowed to render a final decision interpreting the liquidated-damages provisions of the agreement before an aggrieved party can seek relied in federal court. *See id.*, slip op. (Jun. 6, 2005). UTex subsequently filed a complaint asking the PUC to resolve its liquidated-damages claim. UTex further alleged tort and antitrust claims that were dismissed as beyond the jurisdiction of the PUC. UTex's liquidated-damages claim remains pending before the PUC. The parties are awaiting a decision from the arbitrators. Counts Five through Seven, Ten, and Eleven of UTex's First Amended Complaint involve the proceedings in Docket No. 32041.

c. Docket No. 30459

AT&T filed a petition with the PUC seeking to amend its ICAs, including the 2000 ICA with UTex, to implement new unbundling rules issued by the FCC under section 251 of the FTA. *See* 47 U.S.C. § 271. UTex submitted a request to further amend the 2000 ICA to reflect terms and conditions for unbundling of network elements pursuant to sate law and section 271 of the FTA. *See* 47 U.S.C. § 271. After reviewing briefing from the parties on UTex's requested amendment, the arbitrators found that UTex's section 271 unbundling requests were beyond the scope of the proceedings initiated by AT&T, which was limited to conforming existing ICAs with the FCC's new unbundling standards under section 251. *Petition of SBC Texas for Post-Interconnection Dispute Resolution in a Consolidated Change of Law Proceeding for Non-T2A Interconnection Agreements*, Docket No. 30459, Order No. 19 Ruling on Threshold Briefs (Sept. 2, 2005). The arbitrators noted

that an earlier determination in Docket No. 28821 concluded that the PUC had no authority to order the unbundling of network elements under section 271. *See id.* at 7-8. The arbitrators further determined that UTex's state-law unbundling request was beyond the scope of the issues presented in the original proceeding. *See id.* at 8. Counts Eight and Nine of UTex's First Amended Complaint involve the proceedings in Docket No. 30459.

d. UTex's Additional Counts

Counts Twelve through Sixteen of UTex's First Amended Complaint, asserting claims solely against AT&T, do not involve any specific PUC proceeding. Counts Twelve and Thirteen allege under Texas law that AT&T tortuously interfered with UTex's existing and potential contracts with its customers. Counts Fourteen through Sixteen of UTex's First Amended Complaint assert federal antitrust claims against AT&T for its actions as alleged in its breach-of-contract claims against AT&T.

ANALYSIS

1. Standard of Review

In their motions, Defendants seek dismissal of Plaintiff's claims against them pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction and failure to state a claim. Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of an action for lack of subject-matter jurisdiction. Rule 12(b)(1) challenges to subject-matter jurisdiction come in two forms: "facial" attacks and "factual" attacks. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *Santerre v. Agip Petroleum Co.*, 45 F. Supp.2d 558, 566 (S.D. Tex. 1999); *Rodriguez v. Texas Comm'n on the Arts*, 992 F. Supp. 876, 878 (N.D. Tex. 1998). A facial attack, which consists